UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, CLC		
and	**Cases**	**10–CC–276241**
		10–CE–271046
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, CLC, LOCAL 1422		**10–CE–271053**
		10–CC–276207
		10–CE–276221
and		**10–CC–276208**
		10–CE–271047
UNITED STATES MARITIME ALLIANCE, LTD.		**10–CE–271052**
		10–CE–276185
and		
STATE OF SOUTH CAROLINA		
and		
SOUTH CAROLINA STATE PORTS AUTHORITY		

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DECISION

INTRODUCTION[2]

ANDREW S. GOLLIN, ADMINISTRATIVE LAW JUDGE. These consolidated cases concern the operation of a new container-handling facility at the Port of Charleston and the work preservation/work

[1] On July 23, 2021, Jennifer Abruzzo was confirmed as General Counsel for the Board, replacing Acting General Counsel Peter Ohr, who replaced General Counsel Peter Robb. I refer to them collectively as "General Counsel."
[2] Abbreviations are as follows: "Tr." for transcript; "Jt Exh." for Joint Exhibits; "GC Exh." for the General Counsel's Exhibits; "ILA Exh." for International Longshoremen's Association's Exhibits; "USMX Exh." for United States Maritime Alliance's Exhibits; and "SCSPA Exh." for the South Carolina State Ports Authority's Exhibits. Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are based on my review and consideration of the entire record.

acquisition dichotomy. In general, when the object of an agreement, or its enforcement, is to benefit bargaining unit members, or to preserve work traditionally performed by those in the unit, it is considered lawful, primary activity; however, when the object is to acquire work not traditionally performed by unit employees, or to benefit union members elsewhere, particularly where there is no threat to unit jobs, it is considered unlawful, secondary activity.[3] As explained below, I find that while the agreement at issue contains lawful work preservation provisions, the union's lawsuit to enforce those provisions was for an unlawful, work acquisition object, in violation of Section 8(b)(4)(ii)(A) and (B) and Section 8(e) of the National Labor Relations Act ("Act").

STATEMENT OF THE CASES

The collective-bargaining agreement between the United States Maritime Alliance, Ltd. ("USMX") and the International Longshoremen's Association, AFL-CIO, CLC ("ILA") covers all ports along the East and Gulf Coasts of the United States, including the Port of Charleston. It requires that all USMX carrier-members and their agents use ILA-bargaining unit members to load and discharge containers on and off their ships, and perform all other container work, at the facilities (also referred to as terminals) at these ports, and it prohibits the subcontracting of that unit work. The stated purpose of these provisions is to protect against further reduction of the ILA work force caused by containerization.[4]

The State of South Carolina and the South Carolina State Ports Authority ("SCSPA") are not parties to this agreement, but SCSPA contracts with USMX carrier-members to load and unload their ships at the Port of Charleston. Unlike the other ports where ILA-bargaining unit members perform all the container work for covered carriers, the parties have carved out an unwritten exception to the work jurisdiction/no-subcontracting provisions at certain South Atlantic ports, including the Port of Charleston. For nearly 50 years, SCSPA has used a "hybrid" operating model, in which it divides the container work between non-union State employees and members of the International Longshoremen's Association, AFL-CIO, CLC Local 1422 ("Local 1422") working for private companies, which are also members of the USMX and covered under the ILA-USMX collective-bargaining agreement.

ILA and Local 1422 have sought to limit the expansion of the hybrid model because of its potential effect on bargaining-unit work on the East and Gulf Coasts. In 2013, ILA and USMX added Article VII, Section 7(b) to their agreement, which requires USMX to notify any port authority that its members may be prohibited from using a new terminal if all the container work there is not performed by ILA-bargaining-unit employees. This provision remained, unchanged in the parties' current 2018-2024 agreement.

The State and SCSPA recently opened Phase 1 of a new, $1.5 billion container-handling facility at the Port of Charleston, called the Hugh K. Leatherman, Sr. Terminal, where it planned to use the same

[3] Note, *Clarifying the Work Preservation/Work Acquisition Dichotomy Under Sections 8(b)(4)(B) and 8(e) of the National Labor Relations Act: National Labor Relations Board v. International Longshoremen's Association,* 35 CATH. U. L. REV. 1061, 1063–64 (1986).

[4] Prior to the 1960s, longshoremen employed by steamship or stevedoring companies loaded and unloaded cargo into and out of oceangoing ships. Cargo arriving at the port was transferred piece by piece to the ship by longshoremen. The longshoremen checked the cargo, sorted it, placed it on pallets and moved it by forklift to the side of the ship, and lifted it by means of a sling or hook into the ship's hold. The process was reversed for cargo taken off incoming ships. Containerization revolutionized maritime cargo handling and enabled carriers to move numerous smaller packages in portable containers instead of break-bulk cargo, significantly reducing the amount of manpower required to get the cargo on and off the ship. To stem the loss of longshore work caused by containerization, ILA and other unions negotiated agreements with employers to use ILA unit employees to perform the container-handling work.

hybrid model to perform the container work as at its other waterfront terminals. In June 2020, USMX sent SCSPA notification pursuant to Article VII, Section 7(b) regarding the operation of this new terminal. There was uncertainty and disagreement over whether USMX carrier-members could call on/utilize the Leatherman Terminal once it opened if it utilized the hybrid model, but neither USMX nor ILA were willing to submit the dispute to arbitration.

On January 7, 2021, almost three months before the Leatherman Terminal opened, the State and SCSPA filed unfair labor practice charges against USMX, ILA, and Local 1422 alleging that Article VII, Section 7 constituted a "hot cargo" provision, in violation of Section 8(e) of the Act. On March 17, the General Counsel issued a consolidated complaint on these allegations. On March 31, USMX, ILA, and Local 1422 each answered this consolidated complaint.[5]

On April 22, 2021, after the Leatherman Terminal opened and began servicing USMX carrier-members using the hybrid operating model, ILA filed a lawsuit in the Superior Court of New Jersey, which it later amended, alleging that USMX and two of its carrier-members violated the ILA-USMX agreement by allowing non-ILA members to perform bargaining-unit work at the Leatherman Terminal. On April 26, the State, SCSPA, and USMX filed unfair labor practice charges against ILA alleging the lawsuits violated Sections 8(b)(4)(ii)(A) and (B) and 8(e) of the Act. On May 19, the General Counsel issued a second consolidated complaint on these allegations. On May 21, the two complaints were consolidated for hearing. On June 3, ILA answered this second consolidated complaint.

These consolidated complaints were tried together on June 9-10, 2021, via the Zoom for Government platform due to the compelling circumstances caused by the ongoing Coronavirus-19 (COVID-19) pandemic. At the hearing, all parties were afforded the right to call and examine witnesses, present any relevant documentary evidence, and argue their respective legal positions. All parties also filed post-hearing briefs. After careful review of the transcript, exhibits, and briefs, I make the following:

FINDINGS OF FACT

Background

A. *Jurisdiction*

USMX represents its employer-members in negotiating and administering collective-bargaining agreements with ILA and its local affiliates, including Local 1422. USMX's employer-members are container carriers, terminal operators, and port associations, including (among others) Hapag-Lloyd (America), LLC; Orient Overseas Container Line Limited; Charleston Stevedoring Company, LLC; Ceres Terminals Incorporated; Evergreen Shipping Agency (America) Corp.; A.P. Moller–Maersk; Mediterranean Shipping Co. USA Inc.; Ports of America; and South Carolina Stevedores Association, which are responsible for the transportation and handling of cargo shipped to and from the United States. In conducting their business operations annually, USMX's employer-members collectively performed services valued in excess of $50,000 in states other than the State of South Carolina. Based on the

[5] One of USMX's affirmative defenses includes a challenge to the prosecution of these cases following President Biden's removal of then General Counsel Robb. A district court recently ruled in a Sec. 10(j) case that the plain language of the Act permitted the President to relieve Robb of his position without the same process required for Board members. *Goonan v. Amerinox Processing, Inc.*, 1:21-cv-11773-NLH-KMW, 2021 WL 2948052, slip op. at 14 (D.N.J. July 14, 2021). The General Counsel contends that Amerinox and recent Supreme Court precedent, should be sufficient for the Board to decide this issue. See *Collins v. Yellin*, __ U.S. __, 141 S.Ct. 1761, 1782-1783 (2021). However, in *NABET*, 370 NLRB No. 114 (2021), the Board held it will not exercise its jurisdiction to review the actions of the President regarding the removal of the General Counsel. As such, I decline to make any findings regarding this affirmative defense.

foregoing, the employer-members of USMX, including Hapag-Lloyd (America) LLC and Orient Overseas Container Line Limited, have been employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Don Adam is USMX's Chairman and CEO and is an admitted supervisor and agent within the meaning of Section 2(11) and (13) of the Act, respectively.

B. ***Labor Organization Status***

ILA and Local 1422 have been labor organizations within the meaning of Section 2(5) of the Act. Local 1422 also has been an agent of ILA, acting on behalf of ILA, within the meaning of Section 2(13) of the Act. At all material times, Local 1422 has been in trusteeship, with ILA serving as its trustee. As trustee of Local 1422, ILA is responsible for overseeing the operation of Local 1422, including assigning representatives to continue its day-to-day functions. Harold Daggett is ILA President and Dennis Daggett is ILA Vice President. Kenneth Riley has served as a Vice President for ILA and as an Acting Delegate for Local 1422. In his capacity as Vice President and Acting Delegate, Riley has been an agent of ILA and Local 1422 pursuant to Section 2(13) of the Act, including for the purpose of communicating with SCSPA regarding the Leatherman Terminal. (GC Exh. 20).

C. ***Collective-Bargaining Relationship and Master Contract***

The current Master Contract between USMX and ILA is dated October 1, 2018 to September 30, 2024. (GC Exh. 2). It states in relevant part:

ARTICLE 1
SCOPE OF AGREEMENT

Section 2. Recognition.
Management recognizes ILA as the exclusive bargaining representative of longshoremen, clerks, checkers, and maintenance employees who are employed on ships and terminals in all ports on the East and Gulf Coasts of the United States, inclusive from Maine to Texas, and ILA recognizes USMX as the exclusive employer representative in such ports on Master Contract issues.

Section 3. Complete Labor Agreement.
This Master Contract is a full and complete agreement on all Master Contract issues relating to the employment of longshore employees on container and ro-ro vessels and container and ro-ro terminals in all ports from Maine to Texas at which ships of USMX carriers and carriers that are subscribers to this Master Contract may call. This Master Contract as supplemented by local bargaining constitutes a complete and operative labor agreement.[6]

…

APPENDIX A

CONTAINERIZATION AGREEMENT

1. The Agreements of "Management" shall set forth the work jurisdiction of employees covered by the said Agreements in the following terms:

> Management and the Carriers recognize the existing work jurisdiction of ILA employees covered by their agreements with ILA over all container work which

[6] The term "ro-ro" is an acronym that refers to the "roll-on-roll-off" method of moving cargo from ground transport vehicles to a ship and vice-versa.

> historically has been performed by longshoremen and all other ILA crafts at container waterfront facilities. Carriers, direct employers and their agents covered by such agreements agree to employ employees covered by their agreements to perform such work which includes, but which is not limited to:
>
> (a) the loading and discharging of containers on and off ships
> (b) the receipt of cargo
> (c) the delivery of cargo
> (d) the loading and discharging of cargo into and out of containers
> (e) the maintenance and repair of containers
> (f) the inspection of containers at waterfront facilities (TIR men).
>
> As pertains to (e) above, the Carriers Container Council is and shall remain party to the Charleston Container Maintenance and Repair Contract, effective October 1, 1980 on behalf of all of its members and agrees that an identical contract binds its members as to container maintenance and repair in each South Atlantic port. It is further agreed that the Carriers shall only use vendors who have subscribed to such agreements. Fringe benefit coverage shall be under the South Atlantic Funds including GAI, Vacation, Holiday, Container Royalty and local deep sea Welfare and Pension Funds. It is further agreed that each Carrier shall subscribe to the foregoing.
>
> 2. Management, the Carriers, the direct employers and their agents shall not contract out any work covered by this agreement. Any violations of this provision shall be considered a breach of this agreement.
>
> …
>
> 9. Violations of Agreement: This Agreement defines the work jurisdiction of employees and prohibits the subcontracting out of any of the work covered hereby. It is understood that the provisions of this Agreement are to be rigidly enforced in order to protect against the further reduction of the work force. Management believes that there may have been violation of work jurisdiction, of subcontracting clauses, and of this Agreement, by steamship carriers and direct employers. The parties agree that the enforcement of these provisions is especially important and that any violation of such other provisions is of the essence of the Agreement. The Union shall have the right to insist that any such violations be remedied by money damages to compensate employees who have lost their work. Because of the difficulty of proving specific damages in such cases, it is agreed that, in place of any other damages, liquidated damages of $1,000.00 for each violation shall be paid to the appropriate Welfare and Pension Funds. Liquidated damages shall be imposed by the Emergency Hearing Panel described below. [7]

(GC Exh. 2).[8]

D. *South Carolina State Port Authority, the Port of Charleston, and the Hybrid Model*

SCSPA is an instrumentality of the State of South Carolina that operates container-handling facilities/terminals at the Port of Charleston. SCSPA contracts with several USMX carrier-members to provide services related to the loading and unloading of their ships at the Port's waterfront container-handling facilities. (Tr. 48). For 40 years, SCSPA operated two container-handling facilities at the Port of

[7] Following the hearing, the parties reached a stipulation that par. 5 of the consolidated complaint issued on May 19, 2021, misquotes the language from the Master Contract and should be replaced with the language set forth above. The parties also agreed that par. 10 of ILA's April 22, 2021 lawsuit and par. 11 of its April 26, 2021 amended lawsuit incorrectly cited par. "4" rather than paragraph "9" of the Containerization Agreement in the Master Contract. (Jt. Exh. 1). I hereby accept and incorporate this stipulation as part of the record.

[8] Appendix B to the Master Contract are the Rules on Containers, which defines the tasks included in covered work.

Charleston: the North Charleston Terminal and the Wando Welch Terminal. The former opened in the 1940s, and the latter opened in 1981. The State and SCSPA sought to expand its capacity by adding a third terminal on the former Charleston Navy Yard, which was about two nautical miles (seven land miles) from the Wando Terminal. SCSPA obtained a permit to begin construction on this new terminal in 2007, and construction was expected to be completed by 2012. However, shortly after obtaining the permit, the Port of Charleston lost approximately 40 percent of its volume, which caused construction to be delayed. (GC Exh. 8(b), pg. 21). When completed, the Leatherman Terminal was the first new container-handling facility built in the United States in over a decade.

Neither SCSPA nor the State has ever been a party to the Master Contract, or any other labor agreement covering the Port of Charleston. As stated, unlike other ports along the East and Gulf Coasts where ILA-bargaining unit employees perform all the container work, the Port of Charleston, along with the ports in Wilmington, North Carolina and Savannah, Georgia, use a hybrid operating model. This has been the case since containerization began.[9]

SCSPA owns and operates the cranes and other lift equipment used to perform the container-handling services at those terminals, and it employs state employees to operate that equipment (referred to as lift-equipment work). Specifically, the state employees operate SCSPA's ship-to-shore cranes to unload containers from incoming cargo ships and place them onto trucks, which transport the containers to a designated stack location in the Port's container yard. There, other state employees operate SCSPA's lift machines (e.g., rubber tyred gantry cranes and container handlers) to unload the containers and place them in a stack for pickup and delivery. (Tr. 43-44; 273-274). The remaining work---the loading and unloading of ships, the lashing and unlashing of containers, container spotting, securing containers on the ships, etc. (referred to as stevedoring work)---is performed by Local 1422 members. Those members are hired by the carriers and stevedoring companies, like the Charleston Stevedoring Company, which are covered under the Master Contract. SCSPA has used this hybrid model in Charleston for nearly 50 years.[10]

There are approximately 270 state employees and over 2,000 ILA members working on the terminals at the Port of Charleston.[11] Under South Carolina law, state employees are prohibited from being represented by a union for the purposes of collective bargaining.[12]

E. ***Article VII, Section 7***

In 2012, ILA and USMX began negotiations over their 2013-2018 Master Contract. During those negotiations, ILA proposed adding the following "Jurisdiction" language to specifically address the container-handling facilities/terminals, like those at the Port of Charleston, where ILA-bargaining unit employees were not performing all container work:

> All work associated with the loading and unloading of cargo aboard vessels of USMX carriers including the receiving and delivery of all cargo and all terminal work must be performed by ILA-represented workers. All cargo handling work currently contracted out

[9] The record does not reflect how covered carriers who called on the ports in Charleston, Wilmington, or Savannah, were not required to comply with the Containerization Agreement's work jurisdiction/no-subcontracting provisions.
[10] The situation is analogous at the ports in Wilmington and Savannah, involving the same job titles and job descriptions as at the Port of Charleston. (Tr. 249-250). These three ports are the only ones along the East and Gulf Coasts where non-ILA unit members perform container work for covered carriers. These three ports are the only ports along the East and Gulf Coasts where ILA unit employees do not perform the lift-equipment work. (Tr. 272-273)
[11] At the Port of Charleston, ILA affiliates provide representation for those covered under the Master Contract. Local 1422 represents the deep-sea longshoremen, Local 1422-A represents the maintenance and repair workers, and Local 1771 represents the clerks and checkers.
[12] See, e.g., *Branch v. City of Myrtle Beach*, 340 S.C. 405, 411, 532 S.E.2d 289, 292 (2000).

> to port authorities must be brought under the jurisdiction of ILA and all such work must be performed by ILA-represented workers no later than January 1, 2014.

(USMX Exh. 9) (Tr. 186; 251).

USMX rejected this proposal, but the parties continued to discuss work preservation for the ILA bargaining unit. (Tr. 181). The parties eventually agreed to add Article VII, Section 7, which states:

> Section 7. Port Authorities
>
> (a) USMX and ILA shall conduct a study to determine how the business model currently used by port authorities in the Ports of Charleston, SC, Savannah, GA, and Wilmington, NC could be altered to permit work currently performed by state employees to be performed by Master Contract-bargaining-unit employees in a more productive, efficient, and competitive fashion. USMX and ILA will use this study to meet with these port authorities in an effort to convince them to employ Master Contract-bargaining-unit employees.
>
> (b) USMX agrees to formally notify any port authority contemplating the development of or intending to develop a new container handling facility that USMX members may be prohibited from using that new facility if the work at that facility is not performed by Master Contract-bargaining-unit employees.

(GC Exh. 2).[13]

ILA and USMX had different interpretations as to Section 7(b)'s intended purpose and application. USMX Chairman and CEO David Adam, a member of USMX's negotiating committee, testified the purpose was to protect/preserve the division of work as it was historically performed at the ports in the event of changes. USMX intended it to mean that port authorities, like SCSPA, could continue to use the hybrid model at new facilities, as long as the division of work remains the same as at the port's other terminals. (Tr. 188). Adam testified that if there was a new terminal developed at a port using the hybrid model, and there were changes made altering the historic division of work that existed at that port, USMX carrier-members would be prohibited from calling on that facility. (Tr. 190-193; 215-217).[14]

ILA Executive Vice President Dennis Daggett and ILA Vice President and Acting Delegate for Local 1422 Kenny Riley, both members of ILA's negotiating committee, testified the purpose was to contain the hybrid operating model to those existing terminals where it was used. (Tr. 263-266; 285-287). Riley testified the concern was that expanded use of the hybrid model would result in the loss of work at ports where all the container work, including the lift-equipment work, was performed by ILA-bargaining unit employees. (Tr. 286). According to Daggett, the purpose of Section 7 was to "redline" those existing terminals at the ports in Charleston, Wilmington, and Savannah using the hybrid model. USMX carrier-members could continue to call on those terminals without violating the Containerization Agreement, but they could not call on any new terminal where the container work was not all performed by ILA unit members, regardless of the port. (Tr. 266; 286-287).

Daggett further testified that USMX's counsel, Donato Caruso, agreed with ILA's interpretation during the 2013 negotiations. He recalls Caruso being asked exactly what Section 7(b) meant, particularly

[13] The study referred to in Art. VII, Sec. 7(a) was never conducted.

[14] There was discussion based on anecdotal evidence about possible changes affecting ILA unit employees, e.g., automation, modifications to the workforce and job duties, the introduction of third parties, etc.

when ILA representatives voiced concern about the term "may be," and Caruso said it meant that "any new terminal that comes online, if it's not 100 percent ILA then the carriers cannot go there." (Tr. 284).

Caruso testified he did not recall making this statement, and it was USMX's view that Section 7(b), as written, would not prohibit carriers from calling on any new terminals operated by state authorities. (Tr. 302). He explained:

> [T]he theory there was to give notification that there was a possibility that ILA might be able to convince … an arbitrator that certain provisions in the [Master Contract] would prohibit the carriers from calling at a terminal that was not completely manned by ILA Labor. So - so we used the term ["may"] because we didn't want to give the impression that USMX agreed with that - with the Union's position. And we were really thinking … that there would be a need to have that issue resolved, possibly through arbitration.
>
> And conceivably, an arbitrator might rule that the provisions that I'm referring to apply to ports like Savannah and like Charleston, where … the port authorities actually operated the port. And … yet those port authorities were not parties to the contract. And it was possible that … [an] arbitrator might rule in favor of … the Union.
>
> But … it was my position to put [Section 7(b)] in … to have some notification … to those authorities. But my recollection is that, from the very beginning, it was always my opinion that if we were to try to apply those provisions … we would be probably engaging … in a possible violation of [Section 8(e) of the Act] because the port authorities involved are not parties to the [Master Contract]. And they were the ones who had control over the assignment of the work so that, if we were … to attempt to apply those provisions to them, that that might result in both parties being found guilty of [an] 8(e) violation.

(Tr. 303-305).[15]

Five years later, when USMX and ILA negotiated the current Master Contract, they made no changes to Article VII, Section 7. Daggett testified there were no discussions or proposals; they simply agreed to extend the language, as is. (Tr. 295). Caruso recalled that during a meeting with both sides he offered his opinion that Section 7(b) could not be applied to ports like Charleston and Savannah, where the state port authorities operate the terminals, because it would violate Section 8(e) of the Act. (Tr. 305).[16]

ILA and Local 1422, through Riley, have continued to maintain that all container work at new facilities should be performed by ILA-bargaining unit members. In a book published in 2020, entitled "Kenny Riley and Black Union Labor Power in the Port of Charleston," Riley was quoted as saying, "The port can build whatever terminals it wants, and it can put in the most expensive cranes and infrastructure it wants at any terminal it wants, but if no ships call on that terminal, then it just got a brand-new terminal with nothing there…if there are any new terminals built, and if they are not in compliance with the [Master Contract], the ships will not call on those facilities." (GC Exh. 10) (Tr. 100).

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[15] Caurso testified if the matter went to arbitration, it would be USMX's position that the Containerization Agreement would not apply because it had never been applied before to the ports in Charleston, Wilmington, and Savannah. And if the arbitrator agreed, that would end the issue, and the parties would have to deal with it in the future during negotiations. But if the arbitrator ruled those provisions applied, USMX likely would have sought to overturn that ruling in court on the grounds that it put USMX in the position of violating Sec. 8(e) of the Act. (Tr. 312-313).

[16] I credit Caruso over Daggett regarding these negotiations because Caruso's recollection and testimony were more logical and consistent with the other evidence. Specifically, I do not credit Daggett that Caruso stated Sec. 7(b) meant carriers could not go to any new terminal where 100 percent of the container work was not performed by ILA members. It is inconsistent with Caruso's stated reasons for using the term "may," as opposed to "shall" or "will," in Art. VII, Sec. 7(b), as well as his concerns that having and enforcing such a requirement against state port authorities would result in USMX violating Sec. 8(e) of the Act.

Unfair Labor Practices

A. *Communication Regarding Opening of the Leatherman Terminal.*

In 2020, SCSPA announced it intended to operate the Leatherman Terminal using the same hybrid operating model used at the Wando and New Charleston Terminals, with no change to the workforce or the scope/division of work between the state employees and the Local 1422 members. (Tr. 193). On June 8, 2020, David Adam sent SCSPA President and CEO James Newsome III a letter, stating:

> Please accept this letter as formal notification by [USMX] pursuant to Article VII, Section 7(b) of the [Master Contract] that USMX employer-members may be prohibited from using the new facility being developed by [SCSPA] at the Charleston Navy Yard if the work at that facility is not performed by Master Contract bargaining-unit employees.

(GC Exh. 5).

After receiving this letter, Newsome and Adam spoke. Newsome asked Adam whether ILA and USMX would be willing to submit the operating model issue to arbitration. Adam responded that might happen down the road, but currently there was no conflict/grievance to be arbitrated because the Leatherman Terminal had not yet opened. (Tr. 183-184; 196).

In August and September 2020, Newsome communicated with representatives from several USMX carrier-members about SCSPA's plan to operate the Leatherman Terminal using the same hybrid operating model as at the Wando and North Charleston Terminals. The details of those communications are reflected in the record. Several representatives questioned, or expressed concern over, whether ILA had agreed to the use of that operating model, and some made references to Article VII, Section 7 of the Master Contract. Newsome responded there was no need for ILA to agree because SCSPA was not subject to the Master Contract and it was simply continuing to use the same the hybrid model at the new terminal that it had been using at the Port of Charleston for nearly 50 years. A few of the representatives expressed reluctance about having their ships call on the new terminal, while others indicated they would refuse, absent a resolution on the matter. (GC Exhs. 6, 7, 18) (Tr. 62-63; 72-76).[17] Some of those same representatives informed Newsome the matter likely would need to be resolved through arbitration. (Tr. 63-65, 77).

At the end of September or in early October, Adam and Newsome had additional conversations, and Adam notified Newsome that ILA and USMX had different positions regarding the Leatherman Terminal. He stated ILA interpreted the Master Contract to mean that USMX carrier-members could not call on the Leatherman Terminal if the container work was not performed by ILA-bargaining unit employees, but USMX interpreted it to mean that carrier-members could call on the Leatherman Terminal as long as the division of work between the state employees and the Local 1422 members remained the same as it was at the other terminals at the Port of Charleston. There was additional discussion between Newsome and Adam about submitting the matter to arbitration, but Adam again would not commit to doing so at that time because the terminal had not yet opened. (Tr. 209-211).[18]

[17] Several of the representatives Newsome communicated with were also on the USMX Board of Directors. However, the communications indicate each was "speaking" solely in their role as representatives of their individual company or alliance, and not on behalf of USMX. I, therefore, decline to attribute their statements to USMX.

[18] Adam expected a grievance would be filed once the Leatherman Terminal opened, and it was clearer how the work was going to be performed. But before that happened, SCSPA and the State filed the instant charges. As ILA explained at the hearing, the reason it filed a lawsuit instead of pursuing a grievance against USMX was its concern

On October 6, 2020, Newsome met with ILA representatives, including Dennis Daggett. Newsome explained the history and rationale for the hybrid model at South Atlantic ports, like Charleston, and that deviation from that model would put those ports at a competitive disadvantage. During the meeting, Daggett asked Newsome how SCSPA could say it respected ILA if ILA did not have all the jobs at the Charleston terminals. (Tr. 82-83).

On January 6, 2021, Riley and Newsome participated in a conference call with South Carolina lawmakers, as well as others, to discuss the Leatherman Terminal.[19] (GC Exh. 8). During this call, Riley stated ILA and Local 1422 were interested in consuming all the jobs at the Leatherman Terminal. He added that he has opposed the use of the hybrid operating model throughout his 24-year career as a union officer, and that the model was the exception, not the rule, regarding work jurisdiction. He also stated he initially sought to transition away from allowing the hybrid model to the model where ILA-bargaining unit members performed all the container work, but USMX would not agree. He said the next step was to "redline" all existing terminals using the hybrid model and allow them to continue operating that way but require that any new terminal be operated differently. He stated Charleston just happened to be the "first terminal up to bat." Also, there was a discussion that SCSPA wanted the dispute resolved through arbitration, but that neither ILA nor USMX expressed a willingness to do so. Newsome stated that, as a result, SCSPA intended to file a charge with the Board, which it did that day.[20]

B. ***Original and Amended Lawsuit in New Jersey State Court***

On March 30, 2021, SCSPA opened the Leatherman Terminal and began operating it using the hybrid model. There is no evidence that the work performed by state employees at the Leatherman Terminal differed in any way from the other Port of Charleston terminals. The same is true regarding the work the Local 1422 members performed there.

On about April 9, Hapag-Lloyd became the first USMX carrier-member to call on the new terminal. (Tr. 104). On April 21, Orient Overseas Container Line Limited became the second. (Tr. 104). On April 22, ILA filed a lawsuit in New Jersey Superior Court against Hapag-Lloyd and USMX seeking $200 million in damages based on Hapag-Lloyd's decision to contract with non-bargaining unit labor at the Leatherman Terminal. The lawsuit alleges USMX and the carrier-members violated Article I, Section 3 of the Master Contract and Sections 1, 2, and 9 of the Containerization Agreement.[21] (GC Exh. 3). The lawsuit states the Containerization Agreement requires Hapag-Lloyd and all other covered USMX carrier-members to use ILA-bargaining unit employees to load and discharge containers on and off their ships, and perform all other container work, at any marine terminal at which their ships call on the East and Gulf Coasts of the United States. The covered carriers have discretion and are free to change which marine terminal that they bring their cargo to, so long as when a shipping carrier relocates its operations to another terminal on the East or Gulf Coasts of the United States it must go to a terminal that uses ILA-bargaining unit employees to perform all related container work. The lawsuit further states the Leatherman Terminal, as a new terminal, is not one of the terminals recognized under the existing Master Contract that covered carriers

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that a grievance, unlike a lawsuit, could be construed as coercive if filed by ILA, and despite repeated requests, USMX refused ILA's requests to file a grievance or otherwise initiate arbitration.

[19] A partial recording and a transcript were introduced into evidence. (GC. Exh. 8). Exhibit A of the General Counsel's post-hearing brief includes various corrections to the transcript of that recording. Upon my review of the recording and the transcript, as well as there being no objection from any of the other parties, I accept the corrections.

[20] On March 18, 2021, the ILA, Local 1422, and USMX entered into an agreement to avoid a Sec. 10(l) injunction proceeding, agreeing not to take action to enforce Art. VII, Sec. 7(b) of the Master Contract at the Leatherman Terminal while the (first) consolidated complaint was being litigated. (SCSPA Exh. 1(a)).

[21] As stated, the parties' stipulation states the references to Sec. 4 of the Containerization Agreement in the original and amended lawsuits were incorrect, and those references should be to Art. 9.

may call. At various times, ILA reached out to USMX for assurances the container work at the Leatherman Terminal would be performed by ILA-bargaining unit employees, but USMX failed to provide those assurances, and it had carriers call on that terminal even though non-bargaining unit employees would be employed to handle containers there. (GC Exh. 3).

In addition to the claim for breach of the Master Contract, the lawsuit alleges tortious interference with contract, tortious interference with prospective economic advantage, and civil conspiracy. As a remedy, the lawsuit seeks monetary damages in the amount of $200 million, plus attorney's fees, interest, and costs. It does not seek to enjoin the performance of work by non-ILA bargaining unit employees or require the work at issue be assigned to ILA-bargaining unit members. (GC Exh. 3).

On April 26, ILA amended its lawsuit to include Orient Overseas Container Line Limited as a defendant and increased its damages demand to $300 million. (GC Exh. 4). The lawsuit was later removed to the United States District Court for the District of New Jersey and is currently stayed during the pendency of the complaints at issue. (USMX Exh. 7). Neither the original nor the amended lawsuit makes any reference to Article VII, Section 7(b) of the Master Contract.

C. *Response to Lawsuits*

Within two weeks of the ILA filing its lawsuit, five USMX carrier-members contacted SCSPA and demanded to change their scheduled calls from the Leatherman Terminal to the Wando Terminal, because they did not want to get enmeshed in the above lawsuit. SCSPA controls on what terminal the ships are assigned to call. Some of those carriers threatened to have their ships bypass the Port of Charleston altogether in favor of the Port of Savannah if they were not allowed to change terminals. SCSPA eventually granted their requests to change terminals and call on the Wando Terminal.

LEGAL ANALYSIS

A. *Allegations*

The General Counsel's first consolidated complaint alleges that USMX, ILA, and Local 1422 violated Section 8(e) of the Act by entering into, and later reaffirming, the "hot cargo" provision in Article VII, Section 7 of the Master Contract. ILA, USMX, and Local 1422 defend the provision does not violate Section 8(e), and, even if it did, the allegations are untimely. The General Counsel's second consolidated complaint alleges ILA violated Section 8(b)(4)(ii)(A) and (B) of the Act by filing the original and amended lawsuits against USMX, Hapag-Lloyd, and Orient Overseas Container Line Limited, with the unlawful secondary objects of: (1) forcing or requiring USMX and its employer-members to enter into and enforce an agreement with ILA prohibited by Section 8(e); and (2) forcing or requiring USMX and other persons engaged in commerce or in an industry affecting commerce to cease doing business with SCSPA, the State of South Carolina, and other persons. It further alleges ILA violated Section 8(e) by filing the lawsuits interpreting and giving effect to an agreement in which USMX and its employer-members agreed not to do business with another person. ILA defends that its lawsuit to enforce cited provisions of the Master Contract and the Containerization Agreement is lawful conduct with a primary object of preserving unit work.

B. *Overview of Legal Precedent*

Section 8(e) prohibits an employer and a labor organization from entering into any contract or agreement, express or implied, whereby the employer agrees "to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or cease doing business with any other person." Section 8(b)(4)(ii) makes it unlawful for a labor organization to "threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce" in furtherance

of certain unlawful objects, which include "(A) forcing or requiring any employer … to enter into any agreement which is prohibited by Section 8(e) [and] (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person…."

Sections 8(b)(4) and 8(e) prohibit secondary, not primary, conduct. See *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612 (1967). See also *NLRB v. Denver Building Trades Council*, 341 U.S. 675, 692 (1951) (Congress intended to preserve a union's right to bring pressure on offending employers in primary labor disputes, while shielding unoffending employers or persons from pressures in controversies not their own.). If the object of the union's conduct is to put direct pressure on the employer with whom the union has a dispute, the conduct is primary and lawful. If, on the other hand, the object of the union's conduct, taken as a whole, is to bring indirect pressure on the primary employer by involving neutral or secondary employers or persons in the dispute, the conduct is secondary and unlawful. Often, the union will have more than one goal, but so long as an object of the conduct is secondary, the conduct is unlawful. *Denver Building Council*, 341 U.S. at 689.

The various linguistic formulae and evidentiary mechanisms employed to describe the primary/secondary distinction are not talismanic, nor can they substitute for analysis. See generally *Railroad Trainmen v. Jacksonville Terminal Co*., 394 U.S. 369, 386-390 (1969). The inquiry is often an inferential and fact-based one, at times requiring the drawing of lines "more nice than obvious." *Electrical Workers v. NLRB*, 366 U.S. 667, 674 (1961). An overview of the landmark decisions is instructive to the understanding of the issues presented.

In *National Woodwork,* the Supreme Court was confronted with a contractual clause stating members of the carpenters bargaining unit would not handle doors which had been fitted prior to being furnished on the job. The use of precut and prefitted doors from manufacturers would eliminate preparatory work union members traditionally performed on the jobsite. 386 U.S. at 615-616. When precut and prefitted doors were delivered to a project, the union members refused to install them. Charges were filed alleging the clause violated Section 8(e) and the members' refusal to handle the doors violated Section 8(b)(4). The Supreme Court held the clause to be lawful because it was intended to protect and preserve work customarily performed by unit employees, pointing out that Congress in enacting Section 8(b)(4) did not intend to eliminate the distinction between union pressures directed toward "primary" objectives and identical pressures aimed at "secondary" objectives. Id. at 620. According to the Court, the relevant inquiry for determining whether an agreement or activity is for a primary or secondary object is "whether, under all the surrounding circumstances, the [u]nion's objective was preservation of work for [bargaining unit] employees, or whether the [conduct was] tactically calculated to satisfy union objectives elsewhere.… The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-à-vis his own employees." Id. at 644-645.

Although the Court found the clause to be lawful, it held the result would have been different had the clause been applied as a "sword" to reach out and acquire new work rather than as a "shield" to retain work traditionally performed by unit employees. 386 U.S. at 630. It distinguished the case from *Allen Bradley Co. v. Electrical Workers Local 3*, 325 U.S. 797 (1945), in which it found the union's "closed shop" agreements that obligated signatory contractors and manufacturers to only purchase and sell equipment from other signatories, which led to a monopoly, to be unlawful.

Also, the Court recognized but reserved ruling on those unlawful situations where the union's object for enforcing the contract is "to monopolize jobs or acquire new job tasks when their own jobs are not threatened …" Id. at 630-631.

In *NLRB v. Enterprise Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine and General Pipefitters of New York*, 429 U.S. 507, 528–530 (1977), the Supreme Court considered a clause in the agreement between the union and the subcontractor requiring that any pipe threading and cutting be done by unit employees at the jobsite. The general contractor required that the subcontractor purchase certain precut piping for the project. When the precut piping arrived on the job, the union members working for the subcontractor refused to install them. The Board held the work stoppage constituted unlawful secondary pressure in that the subcontractor, the primary employer, could not assign the work to the union, even if it wanted to do so. The Court upheld the Board's decision, finding the strike's objective was "not to preserve [unit work], but to aggrandize, [the union's] position and that of its members." Id. at 528 fn. 16. In reaching this conclusion, the Court held the lawfulness of the work preservation provision provided no defense to the union's unlawful secondary conduct:

> The substantial question before us is whether, with or without the collective-bargaining contract, the union's conduct at the time it occurred was proscribed secondary activity within the meaning of [§8(b)(4)]. If it was, the collective-bargaining provision does not save it. If it was not, the reason is that [§8(b)(4)(B)] did not reach it, not that it was immunized by the contract. Thus, regardless of whether an agreement is valid under §8(e), it may not be enforced by means that would violate §8(b)(4).

Id. at 520-521.

In *NLRB v. Longshoremen ILA,* 447 U.S. 490 (1980) (*ILA I)*, the Supreme Court considered rules adopted by the union and a maritime employer association to help minimize the effects of containerization on the multi-port bargaining unit. The rules stated, in relevant part, that cargo containers owned or leased by marine shipping companies that otherwise would be loaded or unloaded within the local port area (defined as anywhere within a 50-mile radius of the port) instead must be loaded or unloaded by bargaining-unit longshoremen at the pier. The Board found the rules unlawful work acquisition rather than work preservation because the unit employees had never performed the work at issue at the location in question. The Supreme Court disagreed. It held that, to be valid, a work preservation agreement must pass a two-part test: (1) it must have as its objective the preservation of work traditionally performed by employees represented by the union; and (2) the contracting employer must have the power to give the employees the work in question -- the so-called "right of control" test. Id. at 504. The rationale of the second test is that if the contracting employer cannot assign the work, it is reasonable to infer that the agreement has a secondary objective, which is, to influence whoever does have such power over the work. Id. "Were the latter the case, [the contracting employer] would be a neutral bystander, and the agreement or boycott would, within the intent of Congress, become secondary." Id. at 505 (quoting *National Woodwork*, supra, at 644-645).

The Court further held that when work preservation agreements result from technological changes, the definition of work "requires a careful analysis of the traditional work patterns that the parties are allegedly seeking to preserve, and of how the agreement seeks to accomplish that result under the changed circumstances created by the technological advance." 447 U.S. at 507. The focus always must be "on the work of the bargaining unit employees, not on the work of other employees who may be doing the same or similar work," and on how the agreement attempts to preserve jobs impacted by the introduction of new technologies. Id. The Court remanded the case for the Board to examine the scope of the work the unit traditionally performed.

On remand, the Board found some of the work to be functionally related to the traditional work of the unit employees, making enforcement of those rules lawful work preservation. For the rest, the Board found the union was unlawfully attempting to acquire work eliminated through containerization.

On appeal, in *NLRB v. Longshoremen ILA*, 473 U.S. 61 (1985) (*ILA II)*, the Court concluded the Board again erred by focusing on the extra-unit effects of the rules and by finding that work eliminated by technology could never be the object of a work preservation agreement. The Court found the union's objective consistently had been to preserve longshore work and the carriers had the power to control assignment of that work because they owned or leased the containers used for transport. It also concluded that when "the objective of an agreement and its enforcement is so clearly one of work preservation, the lawfulness of the agreement under §§8(b)(4)(B) and 8(e) is secure absent some other evidence of secondary purpose." Id. at 81-82. Thus, the rules were held valid irrespective of their effects outside the bargaining unit because there was no object to disrupt the business relations of a neutral employer. Id. at 79. In reaching this conclusion, the Court commented on the work preservation/work acquisition dichotomy:

> [W]hile we acknowledge that the (preservation/acquisition) dichotomy may be susceptible to wooden application, we are not prepared to abandon it. The "acquisition" concept in the work preservation area originated in *National Woodwork*, where we distinguished *Allen Bradley*, 325 U.S. 797, 65 S.Ct. 1533, 89 L.Ed. 1939 (1945), as involving "a boycott to reach out to monopolize jobs or acquire new job tasks *when [union members'] own jobs are not threatened.*" 386 U.S., at 630-631, 87 S.Ct., at 1260-1261 (emphasis added); see n. 15, supra. An agreement bargained for with the objective of work preservation in the face of a genuine job threat, however, is not " "acquisitive" in the sense that concept was used in *National Woodwork*, even though it may have the incidental effect of displacing work that otherwise might be done elsewhere or not be done at all. See *Pipefitters*, 429 U.S., at 510, 526, 528-529, n. 16, 97 S.Ct., at 894, 902, 902-903, n. 16. Yet as the facts of *Allen Bradley* demonstrate, an agreement that reserves work for union members may also have an unlawful secondary objective. The preservation/acquisition dichotomy, when employed with the *Allen Bradley* distinction firmly in mind, can serve the useful purpose of aiding the inquiry regarding unlawful secondary objectives when an agreement attempts to secure work but "jobs are not threatened."

ILA II, 473 U.S. 61, 79 fn 19.

C. *Article VII, Section 7 is Not Facially Unlawful Under Section 8(e)*

The General Counsel first argues that Article VII, Section 7(b) of the Master Contract, on its face, violates Section 8(e) of the Act because it restricts USMX and its carrier-members from doing business with SCSPA at the Leatherman Terminal if the container work, including the lift-equipment work, was not performed by ILA-bargaining unit employees.[22] USMX, ILA, and Local 1422 defend that the provision is merely a notice requirement, and its prohibition is permissive, not proscriptive. As such, they argue there is no agreement prohibiting carrier-members from calling on the Leatherman Terminal. They also argue that even if the provision had an unlawful object, the Section 8(e) allegation is untimely because the parties entered into the 2018-2024 Master Contract well prior to the six-month period in Section 10(b) of the Act.

In *General Teamsters, Local 982 (J.K. Barker Trucking Co.)*, 181 NLRB 515, 517 (1970), enfd sub. nom. 450 F.2d 1322 (D.C. Cir. 1971), the Board set forth the following principles in determining whether a contractual clause violates Section 8(e):

[22] As an instrumentality of the State of South Carolina, SCSPA is not an employer within the meaning of Section 2(2) of the Act., but it is a "person" engaged in commerce within the meaning of Sec. 2(1), (6), and (7) of the Act when evaluating a "labor dispute" involving secondary activity. See generally, *Plumbers, Steamfitters, Refrigeration, Petroleum Fitters, and Apprentices of Local 298* v. *County of Door,* 359 U.S. 354, 358 (1959). See also *Electrical Workers Local 3*, 220 NLRB 785, 786 (1975); *Longshoremen Local 16 (City of Juneau)*, 176 NLRB 889 (1969*).*

> [I]f the meaning of the clause is clear, the Board will determine forthwith its validity under 8(e); where the clause is not clearly unlawful on its face, the Board will interpret it to require no more than what is allowed by law. On the other hand, if the clause is ambiguous, the Board will not presume unlawfulness, but will consider extrinsic evidence to determine whether the clause was intended to be administered in a lawful or unlawful manner. In the absence of such evidence, the Board will refuse to pass on the validity of the clause.

Article VII, Section 7(b) is not clearly unlawful on its face. The provision does not require USMX or its carrier-members to boycott the Leatherman Terminal or to cease doing business with SCSPA or any other employer or person. It requires that USMX formally notify any port authority contemplating the development of or intending to develop a new container handling facility that USMX members "may be prohibited" from using the facility if the work there is not performed by bargaining-unit employees.[23] The General Counsel argues the phrase "may be prohibited" should be interpreted to mean "will be prohibited."[24] When interpreting contractual terms, the Board gives them their "ordinary and reasonable meaning." *Silver State Disposal Service, Inc*., 326 NLRB 84, 85 (1998). See also *Supreme Sunrise Food Exchange, Inc*., 105 NLRB 918, 920 (1953). The word "may" is ordinarily construed to mean permissive and discretionary; whereas the words "will" or "shall" mean imperative or mandatory. See *The Variable Meaning of Words; Interpretation or Construction of Particular Words and Phrases,* 11 WILLISTON ON CONTRACTS § 30:10 (4th ed.) (May 2021 Update). See also *Kingdomware Techs., Inc. v. United States*, ___U.S. ____ 136 S. Ct. 1969, 1977 (2016) ("Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement."). The parties are aware of this distinction because they use "may" and "shall" throughout the Master Contract to differentiate between discretionary and mandatory terms. See e.g., Article IV (Local Fringe Benefit Contributions), Article V (Utilization of Work Force), Articles VII-IX (Jurisdiction), Article XIV (Grievance Procedure), and Article XV (Accommodations) of the Master Contract. (GC Exh. 2). Absent evidence to the contrary, I decline to interpret Article VII, Section 7(b) as reflecting an agreement to require anything unlawful.

Section 7(b)'s failure to define the circumstances where carriers would be prohibited from calling on the new terminal does not make the provision ambiguous. Even if did, the extrinsic evidence does not establish the parties agreed to administer the provision in an unlawful manner. In fact, aside from requiring notification, ILA and USMX do not agree how Section 7(b) should be administered in relation to other provisions in the Master Contract. During negotiations, they discussed the matter, generally, but they reached no agreement. ILA's view was that covered carriers would be prohibited from calling on the new facility if all the container work was not performed by ILA-bargaining unit employees. USMX's view was that covered carriers could not be prohibited from calling on the new facility, so long as the division of the work between the bargaining unit and non-bargaining unit employees was the same as at the other facilities at that same port. USMX anticipated that once a new facility was finally constructed, ILA would argue to an arbitrator that the other provisions in the Master Contract supported its interpretation, which is why USMX proposed using "may be prohibited" in Section 7(b), because it wanted to preserve its argument that it did not agree with ILA's interpretation. Additionally, Caruso told ILA representatives during subsequent

[23] SCSPA and the State of South Carolina argue Art. VII, Sec. 7(b) does not apply because they were well beyond "contemplating the development of or intending to develop" the Leatherman Terminal when the parties added Art. VII, Sec. 7(b) in 2013, and certainly when Adam sent his June 8 "notification" letter to Newsome.

[24] The State and SCSPA contend that Adam admitted on the stand that "may" in Section 7(b) held no practical importance because ILA's unlawful objective of acquiring work is the only possible trigger for carriers being prohibited from calling on a terminal under that provision. This contention is simply incorrect. Adam testified that, from USMX's perspective, the purpose of Sec. 7(b) was to protect/preserve the division of work *as it was historically performed* at these ports. He stated USMX's carrier-members could call on any new terminal as long as the division of work remained the same as at other terminals at that same port. If the division of work changed, e.g., the port authority expanded its workforce or had state employees perform work historically done by ILA-members, Adam testified that carrier-members then could not call on that terminal.

negotiations that USMX's view was the parties could not require state-operated ports, like Charleston, which are not parties to the agreement, to use ILA-bargaining unit members to perform all container work at a new facility, without potentially violating Section 8(e) of the Act.

D. *No Timely "Agreement" to Restrict Carriers from Doing Business with SCSPA in Violation of Section 8(e)*

The General Counsel next argues that in communications with SCSPA between June 2020 and January 2021, representatives from USMX, ILA, and Local 1422 made statements reflecting an (implied) agreement to interpret and apply Article VII, Section 7(b) in a manner that violated Section 8(e) of the Act. To violate Section 8(e), the agreement, express or implied, must be "entered into" within the six-month period set forth in Section 10(b) of the Act. The Board has held the words "to enter into" must be interpreted broadly and encompass the concepts of initial execution, reaffirmation, maintenance, or enforcement of any agreement within the scope of Section 8(e). See *Dan McKinney Co*., 137 NLRB 649, 653–657 (1962). A unilateral attempt to enforce a facially unlawful provision within the Section 10(b) period is sufficient to reaffirm the agreement. See *General Truck Drivers Local 467*, 265 NLRB 1679, 1681 (1982), enfd. mem.723 F.2d 915 (9th Cir. 1983); *Chicago Dining Room Employees Local 42 (Clubmen, Inc.)*, 248 NLRB 604, 607 (1980). However, where, as here, the provision is not facially unlawful, the reaffirmation must be bilateral. See *Sheet Metal Workers Local 27 (AeroSonics, Inc.)*, 321 NLRB 540, 540 fn.3 (1996).

The General Counsel contends that Riley, Adam, and representatives from USMX carrier-members made statements reflecting or reaffirming a timely agreement to prohibit USMX carrier-members from calling on the Leatherman Terminal if the container work, including the lift-equipment work, was not all performed by unit members. Riley's cited statements clearly show ILA and Local 1422 wanted, and claimed the right, to perform all container work at the Leatherman Terminal. USMX, however, did not agree. Adam advised Newsome about the disagreement, stating that USMX believed that carrier-members could call on the Leatherman Terminal as long as the division of work between the state employees and ILA-members remained the same as at the Wando and North Charleston Terminals. Newsome acknowledged the dispute and asked Adam multiple times to submit the matter to arbitration for a decision, and Adam stated it would need to wait until after the Leatherman Terminal opened and began operating. The USMX carrier-member representatives that Newsome communicated with also recognized the disagreement when they asked him whether a resolution had been reached with ILA and expressed unwillingness to accept scheduled calls to that terminal without such a resolution. A few also stated the matter likely would need to be submitted to an arbitrator. Overall, I find this evidence establishes disagreement, rather than agreement.

Based on the forgoing, I find the General Counsel has failed to establish ILA, USMX, and Local 1422 entered into, or reaffirmed, an agreement, express or implied, that violates Section 8(e) of the Act.

E. *ILA's Lawsuit Seeks Unlawful Interpretation of Master Contract Provisions and Threatens or Coerces USMX and its Carrier-Members to Not Do Business with the State and SCSPA in Violation of Section 8(b)(4)(ii)(A) and (B) and Section 8(e)*

1. The Parties' Arguments

The General Counsel argues that ILA's lawsuit violated Section 8(b)(4(ii)(A) and (B) of the Act by threatening, coercing, and restraining USMX and its carrier-members with the object(s) of: (1) converting facially valid Master Contract provisions into prohibitions that violate Section 8(e) of the Act; and (2) forcing or requiring USMX and its carrier-members to cease doing business with the State of South Carolina and SCSPA at the Leatherman Terminal. A good-faith prosecution of a reasonably based contract claim, by itself, is not unlawful under Section 8(b)(4)(ii). Rather, the validity of the prosecution, whether

through a lawsuit or grievance, is determined under the principles of *Bill Johnson's Restaurant v. NLRB*, 461 U.S. 731 (1983), as interpreted and modified in *BE&K Construction Company*, 351 NLRB 451 (2007).[25] Under this standard, the pursuit of a claim is unlawful coercion only if it is both objectively and subjectively baseless when it is filed, or it is filed with an unlawful object. Id. See also *Road Sprinkler Fitters Local Union 669 (Firetrol Protection Systems, Inc.)*, 365 NLRB No. 83, slip op. at 1 fn. 3 (2017), enfd. 2018 WL 3020513 (unreported decision); *Elevator Constructors (Long Elevator)*, 289 NLRB 1095 (1988), enfd. 902 F.2d 1297 (8th Cir. 1990).

ILA's lawsuit claims that USMX and the two carrier-members violated Article 1, Section 3 of its Master Contract and Sections 1, 2, and 9 of its Containerization Agreement by calling on the Leatherman Terminal even though they knew that non-ILA bargaining unit employees would be employed to perform container work.[26] The lawsuit further claims that USMX and its carrier-members "intentionally and maliciously interfered without justification with the ILA's future ability … to preserve jobs for its members in accordance with the work jurisdiction provisions of the Master Contract, and to enforce the work jurisdiction provisions of the Master Contract." The General Counsel argues ILA filed the lawsuit with the object of forcing USMX and its carrier-members to agree that these facially valid provisions prohibited them from calling on the Leatherman Terminal unless bargaining-unit employees performed all container work, including the lift-equipment work, in violation of Section 8(b)(4)(ii)(A) and Section 8(e).

The General Counsel also argues that by filing the lawsuit ILA seeks to have USMX and its carrier-members cease doing business with the State and SCSPA at the Leatherman Terminal, in violation of Section 8(b)(4)(ii)(B). Under Board law, the "cease doing business" object includes a partial cessation. *Road Sprinkler Fitters*, supra, slip op. at 6 (citing to *NLRB v. Operating Engineers Local 825 (Burns & Roe)*, 400 U.S. 297, 304–305 (1971)). Section 8(b)(4)(ii)(B) prohibits a labor organization that has a labor dispute with a primary employer from pressuring other neutral employers who do not do business with the primary to increase its leverage in its dispute with the primary. See, e.g., *National Woodwork*, 386 U.S. at 622-627. A union that files a claim based on an interpretation of a collective-bargaining agreement with the object of acquiring work for its members, rather than to preserve the work they have traditionally performed, engages in unlawful secondary activity. Specifically, pursuing a claim based on a reading of a contract that would effectively convert a lawfully written provision into a de facto "hot cargo" provision is coercion of a neutral employer in violation of Section 8(b)(4)(ii)(B). However, such a claim is lawful despite the presence of a "cease doing business" object where the primary objective is preserving work for unit employees. *Id.* at 644-645.

The General Counsel next argues ILA's primary dispute is with the State and SCSPA, with the object of trying to obtain the lift-equipment work at the Leatherman Terminal, and it has enmeshed neutrals, USMX and its carrier-members, by threatening to file and filing the lawsuit. In so doing, ILA is alleged to have engaged in threatening, coercing, and restraining conduct with the object of getting USMX and its carrier-members not to use the Leatherman Terminal. The General Counsel asserts ILA's lawsuit achieved its desired effect by causing USMX carrier-members to demand that SCSPA accommodate their vessels at the Wando Terminal rather than the Leatherman Terminal, and by causing two USMX carrier-members to threaten to skip the Port of Charleston altogether if their request to call somewhere other than the

[25] In fn. 5, the Supreme Court in *Bill Johnson's* held a lawsuit that is not baseless and retaliatory may violate the Act only if it is claimed to be federally preempted or has an objective that is illegal under federal law. 461 U.S. at 737 fn. 5. *BE&K* did nothing to change these exceptions.

[26] ILA's argument regarding USMX is that it was aware of the relevant contractual provisions and did nothing to dissuade its carrier-members from calling on the Leatherman Terminal.

Leatherman Terminal was not accommodated. By enmeshing neutrals into its primary dispute with the State and SCSPA, the General Counsel argues ILA violated Section 8(b)(4)(ii)(B).[27]

In its defense, ILA argues Congress did not intend to outlaw all secondary activity when it enacted and amended Section 8(b)(4); it only intended to prohibit certain conduct aimed at specific objectives. The two-part inquiry for determining if there is a violation is: (1) whether the union's conduct is threatening, coercive, or restraining, and (2) whether it is for a proscribed purpose or object. Citing to *Bill Johnson's* and *BE&K*, among other cases, ILA argues that the First Amendment precludes the Board from finding a well-founded lawsuit, as opposed to a contractual grievance, to be unlawful conduct, because such a finding would interfere with the union's constitutional right to petition the government. ILA further argues that if its conduct is not unlawful, it is unnecessary to determine whether its object was unlawful, because both are required for a violation. The Board rejected a similar argument in *Road Sprinkler Fitters*, supra slip op. at 1 fn. 3, where it held it may enjoin a lawsuit that has an illegal objective under federal law without violating the First Amendment, regardless of whether the lawsuit had an objectively reasonable basis or was filed in good faith. Id.

The issue, therefore, is whether ILA had a lawful work preservation object for filing and amending the lawsuit. As stated, to be valid, the work preservation agreement must: (1) address work traditionally performed by bargaining-unit employees, and (2) the contracting employer must have the right to control who performs the disputed work.

2. Prior Work Preservation vs. Work Acquisition Cases in Maritime Industry

Since *ILA I and II*, the Board and courts have applied the work preservation test in evaluating agreements covering container-handling terminals in the maritime industry, with mixed results.

In *Longshoremen ILA Local 1291 (Holt Cargo Systems, Inc.)*, 309 NLRB 1283 (1992), the agreement required that covered carriers use ILA unit employees to perform all container work, including maintenance and repair. Holt operated at a pier in Gloucester City, New Jersey where it provided stevedoring and warehousing services to three covered carriers that did not directly employ anyone to maintain or repair their shipping containers or chassis. Holt performed this work for the carriers using employees represented by the Machinists Union, who had performed this work for several years and had been awarded the work, over the ILA, following a 10(k) hearing. Holt later began stevedoring operations at the Packer Avenue Marine Terminal in Philadelphia, where it intended to transfer and consolidate all its operations. It assigned the maintenance and repair work at Packer Avenue Terminal to its Machinists employees. The ILA filed a grievance against the three covered carriers for using non-ILA unit employees to perform the work there, in violation of the agreement. The Board held the grievance violated Section 8(b)(4)(ii)(B) finding ILA's object was to acquire, rather than preserve, work, because its unit employees had never performed the disputed work at that location. In reaching this conclusion, the Board did not consider and, therefore, did not determine the scope of the appropriate bargaining unit.

In *Bermuda Container Lines, Ltd. v. Longshoremen ILA*, 192 F.3d 250 (2d Cir. 1999), the agreement contained terms virtually identical to those in this case. It required that covered carriers employ ILA unit employees to perform all the container work at all ports along the East and Gulf Coasts where

[27] The General Counsel, the State, SCSPA, and USMX contend ILA violated the March 18, 2021 agreement the parties reached after the initial consolidated complaint issued by filing the lawsuit. ILA contends it took pains to abide by its assurances, noting that the Leatherman Terminal is currently open and operating and staffed by ILA members who have not engaged in any strikes, slowdowns, or picketing. ILA also argues its lawsuit does not seek injunctive relief, only damages. Moreover, the lawsuit does not mention Art. VII, Sec. 7 of the Master Contract. The General Counsel argues this omission was deliberate to avoid an obvious Sec. 8(e) violation.

covered carriers call to load and unload their ships. Bermuda Container Lines ("BCL"), a covered carrier, sought to relocate a part of its operations from the Port of New York, where ILA-represented employees performed the container-handling work, to the Port of Salem, New Jersey, where non-union labor would have performed that work. The ILA filed a grievance alleging the move would divert work away from the unit employees, in violation of the agreement's work jurisdiction/no-subcontracting provisions. The ruling on the grievance was that BCL was free to relocate the covered work to the Port of Salem but it would incur liquidated damages of $2,000 for each container that non-ILA workers handled.

BCL filed a federal lawsuit seeking to vacate the ruling, arguing that enforcing the agreement beyond the Port of New York was unlawful secondary activity in violation of Section 8(e), because ILA was using the agreement to acquire the longshoremen work at the Port of Salem, which is work the ILA unit employees had never performed.[28] The Second Circuit rejected this argument:

> [The agreements'] inclusive language indicates that the agreement not only defined the bargaining unit but also the primary employment relationship on a coastwide basis. We reject BCL's attempt to narrow the employment relationship to include only employees of [particular terminals]. The Containerization Agreement was designed to preserve the work of ILA employees in the coastwide bargaining unit and was directed at BCL by virtue of its status in the multi-employer bargaining association .... BCL's proposed move to Salem would deplete the number of longshore jobs available to ILA workers in the port of New York and divert them to non-union labor in Salem. This effect would directly hurt existing members of the bargaining unit, and … prohibiting BCL's proposed move preserves work within the primary employment relationship.

192 F.2d at 257.

The Court ultimately concluded the contractual provisions at issue had a valid work preservation object directed at the primary employment relationship, and, therefore, were legal under the Act, as was ILA's filing and pursuit of the grievance. Id. at 258.[29]

In *American President Lines v. ILWU*, 611 Fed.Appx. 908, 911 (9th Cir. 2015), the agreement required that covered carriers use ILWU-represented employees to load and unload containers from their ships. The Ninth Circuit held the provision at issue had the lawful primary object of preserving work for the bargaining unit. In reaching this conclusion, the Court held that, in the shipping industry, the bargaining unit is comprised of the multiple employers who are signatory to the operative collective-bargaining agreement, at all covered ports. The inquiry, therefore, is whether employees in the coastwide bargaining unit traditionally performed the work at issue, not whether unit employees at a particular port(s) did. The

[28] BCL also filed a charge with the Board alleging the ILA violated Sec. 8(e) of the Act when it filed the grievance and/or obtained the award because the ILA converted the agreement's no-subcontracting clause into an unlawful union signatory clause that applied outside the New York port. The General Counsel's Division of Advice concluded the containerization provisions were valid work preservation provisions that required BCL to use unit employees to service its ships in Salem, which was within the coastwide bargaining unit.

[29] The State and SCSPA also cite to *Marrowbone Development Co. v. United Mine Workers of America*, 147 F.3d 296 (4th Cir. 1998), in which the Fourth Circuit in applying the work preservation test determined that even though the employees were covered under a national agreement, the appropriate unit for comparison was the employees represented by the local union, not members of the other locals covered under the same agreement, because Sec. 8(e) "evinces a preference for comparing only the jobs of the particular employer's employees directly affected by the dispute, and not all job descriptions represented in all of a union's various locals" and "regardless of whether the agreement is national in scope, in determining whether it preserves or acquires work, the analysis must focus on the work of the local employees and not those elsewhere." Id. at 303. The key distinction is the local union in that case was the certified bargaining representative of the unit of employees working for the employer at the plant at issue.

Court, consistent with *ILA I* and *II*, also concluded the carrier-employers had the right to control the disputed work because they owned or leased the containers used to transport goods. Id.

In *Longshoremen ILWU Local 4,* 367 NLRB No. 64 (2019), enf. denied 978 F.3d 625 (9th Cir. 2020), the agreement stated the employer would use its best efforts to preserve covered work for the ILWU work force, which included the movement of cargo on or off ships of any type, and on docks. There was a Section 10(k) jurisdictional dispute between ILWU and IBEW over the electrical maintenance and repair work at a Vancouver, Washington terminal. The Board awarded the work to the IBEW. But before the issuance of that decision, the dispute was arbitrated, and the arbitrator awarded the work to the ILWU. The IBEW filed charges alleging ILWU violated Section 8(b)(4) of the Act. The administrative law judge found the ILWU lawfully sought to preserve bargained-for work performed by other employees in the coastwide bargaining unit. The Board reversed, holding the proper inquiry is "whether employees have performed work for the specific employer, not whether employees in the multiemployer bargaining unit as a whole [did]." 367 NLRB No. 64, slip op. at 4. Further, the Board found the evidence presented, which consisted of testimony from a handful of ILWU-represented employees that performed some disputed work for covered employers and job postings seeking to hire ILWU members for positions that require electrical skills, to be insufficient to establish the coastwide unit traditionally performed the disputed work. Id.

The Ninth Circuit declined to enforce, holding, in relevant part, that the Board performed an "impermissibly narrow construction of the work preservation doctrine" by incorrectly making prior performance of the specific work by unit employees at the specific facility a "talisman," and in so doing, "eluded the inferential and fact-based inquiry required" under *ILA I* and *II*. 978 F.3d at 639-640.[30]

The General Counsel, the State, and SCSPA rely upon the Board decisions in *ILA Local 1291* and *ILWU Local 4* to contend the work preservation test is not met in this matter because: (1) ILA-bargaining unit employees have never performed the lift-equipment work at any of the Port of Charleston Terminals; and (2) SCSPA has the exclusive right to control who performs that work because it owns the necessary equipment. ILA, in contrast, maintains that *Bermuda Container* applies and the test is met here because: (1) the Master Contract covers a coastwide bargaining unit, and employees in that unit have historically performed the lift-equipment work for covered carriers at other ports along the East and Gulf Coasts; and (2) USMX carrier-members ultimately have the right to control who performs the work because they determine which ports they call on to load and unload their owned or leased containers, as evidenced by those carrier-members that demanded SCSPA redirect their scheduled calls from the Leatherman Terminal to the Wando Terminal, as well as those carriers that threatened to bypass the Port of Charleston altogether if they were not redirected away from the Leatherman Terminal.[31]

3. The Master Contract is a Valid Work Preservation Agreement

The Master Contract indicates the parties intended for a single, multi-port bargaining unit. Article I, Section 2 recognizes that ILA is the exclusive bargaining representative of *all* longshoremen, clerks, checkers, and maintenance employees employed on ship and terminals in *all* ports on the East and Gulf Coasts of the United States, inclusive from Maine to Texas. All references in the Master Contract are to

[30] The Court held the Board erred by deeming *ILA I* and *II* inapplicable and reserved only for complex cases of technological displacement, finding, instead, the *ILA* cases applied to both the simple and more complex cases. 978 F.3d at 639. The Court held regardless of the scope, "the inquiry remains the same: focused on bargaining unit workers rather than non-unit workers currently doing the same or similar work; unconcerned with the work's precise location; and accommodative toward change (or even the threat of change), including the elimination of traditional work." Id.

[31] The underlying service agreements between the carrier-members and SCSPA were not presented. As such, the details about the parties' rights and obligations are unknown, aside from Newsome's testimony that SCSPA has the authority to assign what terminal a carrier's ship calls on at the Port of Charleston.

bargaining-*unit* employees. For example, Article II, Section 5 states the work described in the jurisdiction provisions are not to be performed by supervisors or other "non-bargaining unit employees." Article VII, Section 7(a) and (b) refer to the work performed by "Master Contract-bargaining unit employees." Article VII, Section 11 reaffirms ILA's jurisdiction as set forth in the Master Contract, from the point at which the container/cargo comes within the control of the "Master Contract-bargaining-unit members." [32]

This language, as well as the contractual similarities with *Bermuda Container*, lead me to conclude that a coastwide unit is appropriate, and there is no dispute that unit employees working at all other ports along the East and Gulf Coasts, except in Charleston, Wilmington, and Savannah, have traditionally performed all the lift-equipment work at issue. The cases relied upon by the General Counsel, the State, and the SCSPA for port-specific units are distinguishable. In *Longshoremen ILA Local 1291*, the Board did not address the appropriateness of the coastwide unit, and unlike *ILWU Local 4*, this case does not involve a jurisdictional dispute between unions claiming work that has been decided through the 10(k) process, and, as stated, there is no dispute employees in the coastwide unit have traditionally performed the lift-equipment work at other ports. Additionally, while SCSPA controls the lift-equipment work at the Port of Charleston Terminals, the USMX carrier-members, like the carrier-members in *ILA I* and *II,* own or lease their containers, and, therefore, determine what ports they call on, which ultimately gives the carriers the right to control who performs the lift-equipment work on their containers. Thus, under the circumstances presented, I conclude the cited provisions in the Master Contract and Containerization Agreement constitute a valid work preservation agreement.

4. ILA's Lawsuit Seeks Work Acquisition, Not Work Preservation

As discussed, however, a valid work preservation agreement does not shield a union from liability under Section 8(b)(4) when it uses the agreement as a sword to achieve an unlawful, secondary object. *Pipefitters*, 429 U.S. at 520-521. See also *Elevator Constructors*, 289 NLRB at 1095. The Supreme Court has held enforcement of a valid work preservation agreement is lawful *in the face of a threat to unit jobs*, as long as the object is not to monopolize jobs or acquire job tasks outside the unit. *ILA II*, 473 U.S. at 79. See also *National Woodwork*, 386 U.S. at 630; *Pipefitters*, supra at 528–30. See also *Air Line Pilots Ass'n (ABX Air, Inc.),* 345 NLRB 820, 822-823 (2005), enf. denied, 525 F.3d 862 (9th Cir. 2008). Therefore, a condition precedent to finding a lawful work preservation object is evidence of an actual or anticipated threat to unit jobs. See generally *Painters & Allied Trades Dist. Council No. 51 (Manganaro Corp.)*, 321 NLRB 158, 168 fn. 27 (1996) (actual threat of job loss not necessary because the anticipation of a threat can by itself motivate a desire to preserve the work traditionally performed by the unit employees). Cf. *Retail Clerks Local 324 (Ralphs Grocery)*, 235 NLRB 711 (1978) (no work preservation objective where no evidence of unit employees being replaced or any diminution of unit work); *Service Employees, Local 32B-32J (Nevins Realty)*, 313 NLRB 392, 400 (1993) enfd. in relevant part 68 F.3d 490 (D.C. Cir. 1995) ("Where, as here, the unit employees have not lost the work they performed, let alone [been] threatened with such loss, it is a non-sequitur to assert that the work the union wants to preserve is fairly claimable by the unit"); and *Teamsters Local 25 (Emery Worldwide)*, 289 NLRB 1395, 1397 (1988) (object not work preservation when employees had not lost any work).

[32] Contrary to the State and SCSPA's argument, I find no indication the parties intended for multiple sub-units with their own scope and contractual arrangements based on geographic location. That is not to say that geography plays no role in the enforcement of relevant provisions of the Master Contract. As discussed, the Containerization Agreement requires that covered carriers and their agents employ ILA-bargaining unit members to perform all container work when they call on ports on the East and Gulf Coast, and it prohibits them from contracting out that work to non-ILA unit employees. However, for nearly 50 years, these provisions have not been applied or enforced against covered carriers that call on the Port of Charleston, where the container work is divided between ILA unit and non-ILA unit employees. The same holds true for the ports in Wilmington and Savannah. As stated, the origin and rationale for this it is not clear from the record, but there is no indication the parties intended to carve out, individually or collectively, these three South Atlantic ports from the multi-port bargaining unit.

ILA relies upon *Bermuda Container*, in which the carrier at issue planned to relocate unit work to another terminal where it would be performed by non-unit employees, resulting in the loss of unit work. Here, however, there is no evidence of any actual or anticipated threat to unit work, only vague speculation.[33] ILA argues, without any evidentiary support, that the unfettered expansion of terminals in Charleston will "by its nature" result in USMX and its carrier-members diverting work from other ports where ILA members perform all the container work to Charleston, to the detriment of the coastwide unit. In addition to lacking any evidentiary support, this argument ignores that Charleston is primarily a regional port. According to Newsome, approximately 30 percent of the cargo delivered there is consumed within the Charleston area, and the "great preponderance" of the rest is consumed in upstate South Carolina, in the Greenville and Spartanburg areas, where BMW, Michelin, and other major customers are located. He further testified that 20-25 percent of the cargo that goes outside of South Carolina goes to North Carolina, Tennessee, and Alabama. A minimal amount of the cargo ends up in the Midwest, and none in the Northeast. (Tr. 143). ILA offered nothing to refute this evidence, only supposition that "discretionary cargo" work might migrate from ILA-controlled ports to Charleston.[34] I find such evidence is insufficient to establish a threat to unit jobs to lawfully invoke the contractual work preservation provisions.

What is not lacking is the evidence of ILA's desire to obtain all the container work at the Leatherman Terminal, as well as at any future container-handling facilities. ILA denies this, but the evidence tells another story. In the 2020 book about his battles with the South Carolina ports, ILA Vice President and Local 1422 Delegate Kenneth Riley foreshadowed ILA's plan: "The port can build whatever terminals it wants, and it can put in the most expensive cranes and infrastructure it wants at any terminal it wants, but if no ships call on that terminal, then it just got a brand-new terminal with nothing there…if there are any new terminals built, and if they are not in compliance with the [Master Contract], the ships will not call on those facilities." ILA Executive Vice President Dennis Daggett chastised Newsome about not assigning all container work at the Leatherman Terminal to ILA members during their October 2020 conversation. Later, during the January 6, 2021 telephone conversation with South Carolina lawmakers, Riley stated that ILA and its local affiliates were interested in consuming all the jobs at the Leatherman Terminal, and were interested in preventing further expansion of the hybrid model.[35]

Based on the foregoing, I conclude ILA's object for its lawsuit against USMX and its carrier-members was work acquisition, not work preservation. I further conclude ILA filed its lawsuit with the object of forcing USMX and its carrier-members to agree that facially valid provisions contained in the Master Contract and Containerization Agreement prohibited them from calling on the Leatherman Terminal unless bargaining-unit employees performed all container work, including the lift-equipment work, in violation of Sections 8(b)(4)(ii)(A) and 8(e). Finally, I conclude that by its lawsuit, ILA also sought to have USMX and its carrier-members cease doing business with the State and SCSPA at the Leatherman Terminal, in violation of Section 8(b)(4)(ii)(B).

[33] ILA argues that because it is enforcing the Master Contract and the Containerization Agreement as it relates to the Leatherman Terminal, and not the Wando and North Charleston Terminals, or the terminals at the ports in Wilmington or Savannah, it is not engaging in unlawful, secondary activity. I reject this argument because, as stated, as a complete cessation is not required for a violation of Sec. 8(b)(4)(ii)(A) or (B). *Road Sprinkler Fitters*, supra, slip op. at 6

[34] Discretionary cargo is cargo that can move to one or more ports based upon inland economics. (Tr. 142).

[35] Despite this evidence, ILA's brief states it "does not care about the work at one terminal in a mid-size port in the Southeast" and "would be happy if it never gets 'the work' at Leatherman," because it is only interested in the integrity of the bargaining unit as a whole and ensuring that carriers not divert cargo outside the unit.

CONCLUSIONS OF LAW

1. Hapag-Lloyd (America) LLC and Orient Overseas Container Line, Ltd. are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Longshoremen's Association, AFL-CIO, CLC ("ILA") and International Longshoremen's Association, AFL-CIO, CLC, Local 1422 ("ILA") are labor organizations within the meaning of Section 2(5) of the Act.

3. ILA filed its lawsuit against United States Maritime Alliance, Ltd. ("USMX") and Hapag-Lloyd (America) LLC and Orient Overseas Container Line Limited with unlawful objects, in violation of Section 8(b)(4)(ii)(A) and (B) and Section 8(e) of the Act.

4. USMX, ILA and Local 1422 did not enter into or reaffirm any agreement, express or implied, that violates Section 8(e) of the Act.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended.[36]

ORDER

International Longshoremen's Association, AFL-CIO, CLC ("ILA"), its officers, agents, and representatives, shall

1. Cease and desist from

(a) Seeking to enforce or apply through litigation the Master Contract, including Article I, Section 3 and Sections 1, 2, and 9 of our Containerization Agreement, to require any United States Maritime Alliance, Ltd. ("USMX") carrier-member not to call at the Leatherman Terminal because employees of the State of South Carolina are performing covered work there.

(b) Pursuing litigation against USMX, or its carrier-members, where an object of the lawsuit is either (1) to force or require any USMX or its carrier-members to enter into or give effect to an agreement, express or implied, whereby any employer with whom it does not have a primary dispute ceases or refrains or agrees to cease doing business with any other person, or (2) threaten, restrain, or coerce USMX or its carrier-members to cease doing business with the South Carolina State Ports Authority, the State of South Carolina, or any other person.

(c) Threatening, coercing, or restraining any employer engaged in commerce or in an industry affecting commerce, where an object thereof is either (1) to force or require any employer to enter into or give effect to an agreement, express or implied, whereby any employer with whom it does not have a primary dispute ceases or refrains or agrees to cease doing business with any other person, or (2) to force or require any person to cease doing business with any other person.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under the Act.

[36] If no exceptions are filed as provided by Sec. 102.48 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, move to dismiss of our lawsuit against USMX, Hapag-Lloyd (America) LLC, and Orient Overseas Container Line, Ltd., filed on April 22, 2021 and amended on April 26, 2021.

(b) Within 14 days from the date of the Board's Order, reimburse USMX, Hapag-Lloyd (America) LLC and Orient Overseas Container Line, Ltd for all reasonable expenses and legal fees, with interest, incurred in defending against the lawsuit.

(c) Within 14 days after service by the Region, post at the ILA's business office a copy of the attached notice marked "Appendix."[37] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the COVID–19 pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if ILA customarily communicates with its employees by electronic means. Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the ILA's authorized representative, shall be posted by ILA and maintained for 60 consecutive days in conspicuous places including all places where notices to employees/members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if ILA customarily communicates with its employees/members by such means. Reasonable steps shall be taken by ILA to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, ILA has gone out of business or closed the facility involved in these proceedings, ILA shall duplicate and mail, at its own expense, a copy of the notice to all current and former members of the Union and current and former employees employed by the Employer at any time since March 30, 2021.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 10 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Union has taken to comply.

Dated, Washington, D.C., September 16, 2021,

Andrew S. Gollin
Administrative Law Judge

[37] If this Order is enforced by a judgment of a United States court of appeals, the words in each of the notices referenced herein reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT interpret our Master Contract, including Article I, Section 3 and Sections 1, 2, and 9 of our Containerization Agreement, to require any United States Maritime Alliance, Ltd. ("USMX") carrier-member not to call at the Leatherman Terminal because employees of the State of South Carolina are performing work there.

WE WILL NOT pursue litigation against USMX, or its carrier-members, where an object of the lawsuit is either (1) to force or require any USMX or its carrier-members to enter into or give effect to an agreement, express or implied, whereby any employer with whom it does not have a primary dispute ceases or refrains or agrees to cease doing business with any other person, or (2) threaten, restrain, or coerce USMX or its carrier-members to cease doing business with the South Carolina State Ports Authority, the State of South Carolina, or any other person.

WE WILL NOT threaten, coerce, or restrain any employer engaged in commerce or in an industry affecting commerce, where an object thereof is either (1) to force or require any employer to enter into or give effect to an agreement, express or implied, whereby any employer with whom it does not have a primary dispute ceases or refrains or agrees to cease doing business with any other person, or (2) to force or require any person to cease doing business with any other person.

WE WILL move to dismiss of our lawsuit against USMX, Hapag-Lloyd (America) LLC, and Orient Overseas Container Line, Ltd. filed on April 22, 2021 and amended on April 26, 2021.

WE WILL reimburse USMX, Hapag-Lloyd (America) LLC, and Orient Overseas Container Line, Ltd. for all reasonable expenses and legal fees, with interest, incurred in defending against the lawsuit.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, CLC

Dated: _____ By:_____ _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

4035 University Parkway, Ste. 200
Winston Salem, NC 27106-3275
Telephone: (336)631-5201
Hours of Operation: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/10-CE-271046 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE